

EXHIBIT 12

INSOLVENCY IN PRIVATE INTERNATIONAL LAW

National and International Approaches

IAN F. FLETCHER

*MA, LLM, MCL, PhD, LL.D
of Lincoln's Inn, Barrister
Professor of Commercial Law and Director of the
Centre for Commercial Law Studies, Queen Mary and Westfield College,
University of London*

CLARENDON PRESS · OXFORD
1999

Oxford University Press, Great Clarendon Street, Oxford OX2 6DP
www.oup.co.uk

Oxford New York

Athens Auckland Bangkok Bogotá Buenos Aires Calcutta
Cape Town Chennai Dar es Salaam Delhi Florence Hong Kong Istanbul
Karachi Kuala Lumpur Madrid Melbourne Mexico City Mumbai
Nairobi Paris São Paulo Singapore Taipei Tokyo Toronto Warsaw
and associated companies in
Berlin Ibadan

Oxford is a registered trade mark of Oxford University Press

Published in the United States
by Oxford University Press Inc., New York

© Ian F. Fletcher 1999

The moral rights of the author have been asserted

First published 1999

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission in writing of Oxford University Press. Within the UK, exceptions are allowed in respect of any fair dealing for the purpose of research or private study, or criticism or review, as permitted under the Copyright, Designs and Patents Act 1988, or in the case of reprographic reproduction in accordance with the terms of the licences issued by the Copyright Licensing Agency. Enquiries concerning reproduction outside these terms and in other countries should be sent to the Rights Department, Oxford University Press, at the address above

British Library Cataloguing in Publication Data
Data available

Library of Congress Cataloging in Publication Data
Fletcher, Ian F.

Insolvency in private international law: national and
international approaches / Ian F. Fletcher.
(Oxford monographs in private international law)
Includes bibliographical references and index.

1. Conflict of laws—Bankruptcy. I. Title. II Series.
K7510.F555 1999 340.9'78—dc21 98-51383
ISBN 0-19-825864-X

1 3 5 7 9 10 8 6 4 2

Typeset in Palatino
by Hope Services (Abingdon) Ltd.
Printed in Great Britain
on acid-free paper by
Bookcraft Ltd., Midsomer Norton, Somerset

Contracts to which the bankrupt is party

The onset of bankruptcy has a variety of consequences with respect to any contracts to which the bankrupt is a party. These include the question whether bankruptcy can have the effect of releasing the parties from their contracts, and any further consequences that ensue from this. In principle, this is a matter to be referred to the governing law of the contract itself, together with any express provisions the parties happen to have included in their agreement. A further possibility may arise if it transpires that, under the foreign law by which the contract is governed, there are provi-

sions capable of yielding some benefit for the creditors that might not be forthcoming under the rules of English law.¹⁷¹ A further occasion for investigating the governing law of the contract is where it is necessary to determine the validity or amount of any claim, whether against or on behalf of the bankrupt's estate, and where the answer is at least partly dependent upon the system of law to be applied. For such purposes, an English court will determine the governing law by applying the Rome Convention on the Law Applicable to Contractual Obligations.¹⁷² The special problem of the discharge of contractual obligations as a consequence of bankruptcy is separately considered at 2.5 and 2.7 below. For the present, we may note that in the event of any divergence between the effects generated by the governing law of the contract and those imposed by the law of bankruptcy itself, the latter will invariably prevail for the purpose of any proceedings over which the courts of the *forum concursus* have jurisdiction. Thus, the rights of a trustee in bankruptcy to disclaim onerous property (which expressly includes any onerous contract) under section 315 of the Insolvency Act, and the converse facility created by section 345 to enable a non-bankrupt party to a contract to apply to the court for an order discharging obligations thereunder in consequence of the other party's bankruptcy, can be invoked even though this may be at odds with the provisions of the governing law.¹⁷³

¹⁷¹ Cf. *Re Suse* (1887) 18 Q.B.D. 660 (CA), where it was held that the contract in question was not governed by the law of New York, whose statutory provisions appeared to confer an advantage from the creditors' point of view.

¹⁷² In force throughout the United Kingdom with effect from 1 April 1991, by virtue of the Contracts (Applicable Law) Act 1990. See *Dicey and Morris, The Conflict of Laws*, 12th edn. (1993), chs. 32, 33.

¹⁷³ For a thorough and masterly examination of the treatment of executory contracts in bankruptcy, written from the perspective of American law, see Westbrook (1989) 74 *Minn. L. Rev.* 227.